Supreme Court, U.S.

991089 DEC 27 1999

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

JOHN R. DEW, on behalf of himself and other Special Agents of the Federal Bureau of Investigation, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL BUREAU OF INVESTIGATION, LOUIS FREEH, Individually, and as Director of the Federal Bureau of Investigation; MICHAEL R. BROMWICH, Individually, and as the Inspector General, United States Department of Justice; JANET RENO, Attorney General of the United States of America; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM S. COHEN, Secretary of the United States Department of Defense; THE UNITED STATES DEPARTMENT OF DEFENSE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. DIENST
Counsel of Record
JAMES M. MOSCHELLA
DIENST & SERRINS, LLP
Attorneys for Petitioners
233 Broadway, 18th Floor
New York, New York 10279
(212) 406-1700

156515

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

75pp

QUESTIONS PRESENTED

1. Can a United States Court review alleged violations of the Uniformed Services Employment and Reemployment Rights Act by the Federal Bureau of Investigation?

2. Do Federal Courts have subject matter jurisdiction pursuant to the Administrative Procedure Act and the Uniformed Services Employment and Reemployment Rights Act to review the military reserve policy of the Federal Bureau of Investigation, which *inter alia* prohibits FBI agents from performing any reserve military training with the Ready Reserve component of the United States Armed Forces, and empowers FBI supervisors to deny agents permission to attend military training as members of the Standby Reserve?

PARTIES TO THE PROCEEDING

The special agents not fully set forth in the caption are as follows:

Michael F. Aiesi; Paul D. Allen, Jr.; Kenneth Andrews; Jeff Angelos; David O. Bailey; Thomas J. Barrett; Bruce Black; Peter S. Bobinski; Douglas H. Brigante; Robert A. Burkes; Thomas J. Campbell; David E. Carman; David S. Cavanaugh; Donald J. Cesare; Ronald H. Cizmar; Ronald H. Cleaver; Ford W. Cole; George W. Connell, III; James N. Corcoran; Marc J. Dallacroce; Richard S. Demberger; Todd V. Di Fede; James E. Diaczyszyn; Patrick J. Donnelly; John K. Donovan; Paul Doyle; Roger G. Eaton; Mark V. Eiler; Leo Farrell; Robert A. Fiatal; Perry A. Forgione; Raymond J. Gannon; Charles W. Giannetti; Terrence D. Gibson; William F. Gittins; Anthony R. Gordon; Daniel Gorman; Eric L. Graff; Gary Graff; Russell L. Gregory; Michael P. Griffin; James M. Harris; Michael J. Harrison; Neil D. Heiner; Gregory A. Hendrickson; Clifford C. Holly; John J. Kane; Jack Kelleher; Philip King, III; Stephen Kodak, Jr.; David Kollender; James M. Laverick; Paul A. Le Veille; Howard A. Leadbetter, II; Mark B. Libman; Douglas E. Linter; Rodney S. Loose; Wayne D. Lord; Mark S. Love; Patrick T. Luzio; Guy L. Marangoni; Robert C. Marshall; Robert S. McCorkle; Martin Mccullough, II; Randy Mondor; John G. Nemec; Laurence H. Newton; John M. O'Neill; Crockett W. Oaks, III; Enrique Olivas; David A. Palladino; Charles A. Pardee; Manuel Perez; Jeffrey S. Pfeiffer; Mark T. Post; Reginald D. Powell; L. Predtechenskis; Alvie L. Price; Charles W. Provine; Peter J. Ronayne; William W. Russ; Richard D. Schwein, Jr.; Donald C. Sheehan; David R. Smith; Una D. Stanton; John E. Stoll; Gerard A. Sullivan; Quinn J. Tamm, Jr.; Daniel H. Tejeda; Kevin L. Theede; Robert C. Thompson; Richard G. Wallace; Brian E. White; Carl V. Wigholm; Donald J. Zembiec.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	4
A. Proceedings Below	4
B. Statement of Facts	6
Reasons for Granting the Writ	11
I. Defendant FBI'S Military Reserve Policy Is Judicially Reviewable Pursuant To The Administrative Procedure Act And The Uniformed Services Employment And Reemployment Rights Act.	12

Contents

Page

A. USERRA neither explicitly nor implicitly precludes judicial review of FBI policy 16

B. The decision of the Court of Appeals conflicts in principle with the Supreme Court's decision in *McNary v. Haitian Refugee Center* and its progeny 20

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 13, 16

Block v. Community Nutrition Institute, 467 U.S. 340, 104 S. Ct. 2450 (1984) 24

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 106 S. Ct. 2133 (1986) .. 11, 23, 26, 29

Christianson v. Hauptman, 991 F.2d 59 (2d Cir. 1993) 12, 13, 29

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 13, 14

Gummo v. Village of Depew, 75 F.3d 98 (2d Cir.), *cert. denied*, 116 S. Ct. 1678 (1996) 14

Heckler v. Chaney, 470 U.S. 821 (1985) 13, 14, 16

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 111 S. Ct. 888 (1991) 11, 20, 21, 22, 23, 25, 26, 29

Peel v. Florida Department of Transportation, 443 F. Supp. 451 (N.D. Fla. 1977) 14

Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) 23

Cited Authorities

Page

Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986) 13

Southern Railroad Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979) 16

United States v. Mitchell, 463 U.S. 206 (1983) ... 12

Universal Health Services of McAllen, Inc. v. Sullivan, 770 F. Supp. 704 (D.D.C. 1991) ..21, 23, 29

Webster v. Doe, 486 U.S. 592 (1988) 14

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1986) 30

Yates v. Merit Systems Protection Board, 145 F.3d 1480 (Fed. Cir. 1998) 14

Statutes:

5 U.S.C. §§ 701 *et seq.* 5, 12

5 U.S.C. § 701(a) 16

5 U.S.C. § 702 .....1, 12, 13

5 U.S.C. § 706(2)(A) 13

10 U.S.C. Part I 7

Cited Authorities

	Page
10 U.S.C. § 10149	8
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	13
28 U.S.C. § 1361	13
28 U.S.C. § 2101(c)	1
28 U.S.C. §§ 2201-02	13
38 U.S.C. §§ 2021-27	14
38 U.S.C. § 4301	2
38 U.S.C. §§ 4301 *et seq.* (1996)	4, 5, 6, 14
38 U.S.C. § 4301(a)(3) (1996)	14
38 U.S.C. § 4311	3
38 U.S.C. § 4311(a)	14, 17
38 U.S.C. § 4315	*passim*
38 U.S.C. § 4316	15
38 U.S.C. § 4323	17

Cited Authorities

	Page
38 U.S.C. § 4324	17
38 U.S.C. § 4325	4, 12, 16, 17, 18, 20, 29
38 U.S.C. § 6323	5
United States Constitution:	
Second Amendment	5, 6
Rules:	
Fed. R. Civ. P. 12(b)(1)	5
Fed. R. Civ. P. 12(b)(6)	5, 6
Other Authorities:	
32 C.F.R. § 44.3(e)(3)	26
32 C.F.R. § 44.5	26, 29
32 C.F.R. § 44.5(b)(2)	8
Army Regulation 135-133, Chapter 2, § III	26, 27
Department of Defense Directive 1200.7	10
Department of Defense Directive 1215.6 (January 31, 1974)	8, 25, 29

Cited Authorities

	Page
H.R. Rep. No. 65, 1994 U.S.C.C.A.N. 2449	14
H.R. Rep. No. 65, 1994 U.S.C.C.A.N. 2451	14
Senate Report No. 103-158, reprinted at 1993 WL 432576	18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided September 28, 1999 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of New York Dated March 27, 1998 ... 17a

Appendix C — Judgment Of The United States District Court For The Southern District Of New York Dated And Filed April 3, 1998 ..... 32a

OPINIONS BELOW

Petitioners appeal from a final order of the United States Court of Appeals for the Second Circuit, dated September 28, 1999. The Opinion of the Court of Appeals is reported at 192 F.3d 366 (2d Cir. 1999). A copy of the opinion is included in the Appendix A at 1a. The Memorandum and Order of the United States District Court for the Southern District of New York (McKenna, J.) is published at 1998 WL 159060 (S.D.N.Y.), and is included in the Appendix B at 17a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its Opinion on September 28, 1999. This Petition for a Writ of Certiorari is filed within 90 ninety days of the date the Court of Appeals' Opinion was entered with the Clerk of that Court pursuant to 28 U.S.C. § 2101(c). Jurisdiction is being invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 702

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall

not be dismissed nor relief therein be denied on the ground that it is against the United States.

* * *

38 U.S.C. CHAPTER 43 — EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are —

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

* * *

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

* * *

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisals prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

* * *

§ 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 [including the FBI] shall prescribe procedures for ensuring that the rights under this chapter apply to all the employees of such agency.

* * *

(d)(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

* * *

§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that —

(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or

(2) the failure of such agency to re-employ the person under such section was otherwise wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioners are all Special Agents employed by defendants, Federal Bureau of Investigation and the United States of America. Petitioners commenced this action pursuant to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301

et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, the "Leave With Pay Law," 38 U.S.C. § 6323, and the Second Amendment to the United States Constitution, challenging the Federal Bureau of Investigation's former, and present "temporary,"[1] policy and practice of denying plaintiffs their right to fully participate in military reserve training as members of the Reserve components of the United States Armed Forces. Petitioners, *inter alia*, seek declaratory and injunctive relief enjoining the defendants from further preventing petitioners, and all other FBI agent reservists, from participating in military reserve membership and training.

Defendants moved to dismiss petitioners' Complaint in its entirety pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. By Memorandum and Order dated March 27, 1998, United States District Judge Lawrence M. McKenna granted defendants' motion brought pursuant to Rule 12(b)(1) and dismissed petitioners' claims brought pursuant to USERRA and the APA for lack of subject matter jurisdiction on the grounds that petitioners failed to exhaust available administrative remedies. The District Court also granted defendants' motion brought under Rule 12(b)(6) as to petitioners' claims brought under the Leave with Pay Law and the Second Amendment for failure to state claims upon which relief can be granted.

Petitioners appealed from that portion of the District Court's decision dismissing, pursuant to Federal Rule of Civil Procedure 12(b)(1), petitioners' claims brought under

---

1. As will be discussed *infra*, the present temporary policy and practice has been operational since August, 1996, and is set to expire in September, 2002.

the USERRA and the APA.[2] By decision dated September 28, 1999, the Court of Appeals affirmed the District Court's dismissal of petitioners' complaint, although on different grounds than those articulated by the District Court. The Court of Appeals held that USERRA does not provide federal courts with subject matter jurisdiction, but rather precludes judicial review of cases involving the FBI's military reserve policy.

B. Statement of Facts

Petitioners are all permanently appointed civil servants serving in the title of Special Agent, Federal Bureau of Investigation (hereinafter, "FBI"), and are civilian employees of the United States government, which is an "employer" as that term is defined by the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 *et seq*. (1996) (hereinafter, "USERRA"). Petitioners are all either current, former or prospective members of the Reserve components of the Armed Forces of the United States. (JA-10a).[3]

---

2. Petitioners did not appeal the District Court's decision dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), petitioners' claims under the Leave With Pay Law and the Second Amendment. Further, although defendants argued below that petitioners' claims under the APA and USERRA should be dismissed for failure to state a claim upon which relief can be granted, the District Court never decided that argument. Rather, the Court dismissed the APA and USERRA claims for lack of subject matter jurisdiction. Accordingly, petitioners' appeal did not address defendants' 12(b)(6) argument as to the petitioners' APA and USERRA claims.

3. Unless otherwise stated, citations to (JA-____), followed by a number, refer to the relevant page(s) of the Joint Appendix filed in the Court of Appeals.

Pursuant to Title 10, Part I of the United States Code, the Armed Forces of the United States are organized into Regular (Active Duty) components and Reserve components. The Reserve components of the United States Armed Forces consist of the Army National Guard, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. (JA-11a).

Within the Reserve components there are two organizational categories: the Ready Reserve and the Standby Reserve. Those individuals in the Ready Reserve are required to participate in at least forty-eight scheduled training periods (called "Inactive Duty for Training" or "drills") per fiscal year and must also serve on Active Duty for Training (the "ADT") for at least fourteen days per fiscal year.[4] Members of the Ready Reserve are paid by the United States Department of Defense for this duty and earn "points" towards military retirement. (JA-12a).

Members of the Standby Reserve, as opposed to members of the Ready Reserve, are not required to perform any training and thus do not earn pay or points towards retirement. In order for a member of the Standby Reserve to

---

4. As pleaded in the Complaint, a Reservist typically undergoes three types of military training — initial active duty for training, active duty for training and inactive duty for training. "Initial active duty for training" is that period of active duty military training which a service member undergoes at the commencement of their enlistment. "Active duty for training" refers to the period of annual active duty military training that a reservist attends, typically two weeks per fiscal year. "Inactive duty for training" refers to the scheduled training periods (or "drills") which reservists attend, typically one weekend per month or less.

preserve his or her standing in the Reserve system and to earn retirement points to qualify for a satisfactory year, the member may volunteer, but only without pay and at their own expense (*e.g.*, meals, transportation and lodging), to participate in Active and/or Inactive Duty for Training pursuant to the Department of Defense Directive 1215.6. (JA-13a).

Pursuant to 10 U.S.C. § 10149, the Ready Reserve system must be screened to ensure *inter alia* that there are no members of the Ready Reserve "whose mobilization in an emergency would result in an extreme . . . community hardship." Pursuant to this section, those members "screened" from the Ready Reserve are either: (1) transferred to the Standby Reserve; (2) transferred to the Retired Reserve; or (3) discharged from the Armed Forces. *Id.* The Secretary of Defense has been delegated as the authority over the screening of the Ready Reserve. The Secretary of Defense has promulgated regulations governing the screening of "key federal employees" from the Ready Reserve. *See* 32 C.F.R. § 44.5(b)(2).

Pursuant to Department of Defense ("DOD") Directive 1215.6, promulgated on January 31, 1974, reservists who have been screened to the Standby Reserve as "key federal employees" may attend active and inactive duty for training as members of the Standby Reserve to maintain their equity in the reserve system.

The vast majority of petitioners in the case at bar were members of the Ready Reserve who were directed by defendant, FBI, as a condition of their employment as FBI Special Agents to either transfer to the Standby Reserve or otherwise resign from their military positions. (JA-13a). As

defendants concede, the FBI has maintained a long-standing policy of prohibiting special agent reservists from participating in any form of military training. (JA-14a). Those agents who attended any form of military training were subject to discipline by the FBI, including suspension without pay. In addition, those agents who attended annual military training (the "ADT") were mandated to use their accrued annual leave and vacation time to attend such training. (JA-78a).

On August 29, 1996, defendant, FBI, modified this long-standing policy on a temporary basis, but only to the extent as follows: an agent who seeks to volunteer for any reserve training may submit a request for approval to his or her supervisor or division head at least thirty days in advance of the training, and this request will be disapproved if in the supervisor's view granting the request would unreasonably and adversely affect "FBI operations." (JA-14a, 24a). This temporary policy was extended on a one-year trial basis on September 5, 1997, and again in September 1998, and unless extended expires in September 2002. (JA-63a).

Agents cannot attend any military training without first obtaining the approval of the agent's supervisor. Under the modification, agent reservists must request permission to attend not only active duty for training (the "ADT") but also inactive duty for training (weekend "drills"). Under the current policy, agents are prohibited from serving in the Ready Reserve and from otherwise affiliating with a Ready Reserve unit. Petitioners can only serve in the Standby Reserve, without pay and at their own expense, and only then may they request permission to attend military training, which request can be denied by an agent's supervisor. There are no guidelines, rules or regulations setting forth the criteria

for a supervisor's denial. Over the years, the FBI has attempted to justify its policy by designating all special agents, regardless of the actual duties performed, as "key federal employees," ostensibly pursuant to Department of Defense Directive 1200.7.

The FBI, by prohibiting agents from training under both the former and the present policy, has prevented many of the petitioners from earning the "points" necessary to have a satisfactory year for purposes of retirement from the military reserves. Because many of the petitioners could not accumulate the requisite points as a result of FBI policy, they were separated from the reserve and discharged without a pension or retirement. (JA-37a).

The FBI is the only federal executive agency to adhere to such a restrictive policy. Agents of the Central Intelligence Agency, Drug Enforcement Administration, Bureau of Alcohol, Tobacco and Firearms, United States Marshal's Service, Immigration and Naturalization Service, as well as United States Attorneys, who often work closely with FBI agents, are all permitted full participation in the Reserve components of the United States Armed Forces, including membership in the Ready Reserve. (JA-80a). Although the United States Secret Service prohibits its Special Agents from serving in the Ready Reserve, it does not prevent its agents from attending military training as Standby reservists, as the FBI does. (JA-146a). The FBI is the only agency to give its supervisors the unbridled discretion to deny an agent's request to attend military reserve training.

REASONS FOR GRANTING THE WRIT

Recognizing the crucial role that the Reserve components of the United States Armed Forces play in the security of the United States, and seeking to eliminate or minimize the disadvantages to employees who perform service in the military reserves, Congress passed the Uniformed Services Employment and Reemployment Rights Act ("USERRA") in 1994 in order to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." Despite express statutory provisions making USERRA applicable to defendant, FBI, and the strong presumption in favor of judicial review of agency action codified in the Administrative Procedure Act, the Court of Appeals for the Second Circuit held below that federal courts do not have subject matter jurisdiction to review violations of USERRA by the FBI, and that USERRA impliedly precludes judicial review of the FBI's military reserve policy under the Administrative Procedure Act.

This case presents a novel question of law regarding these important statutes and, to petitioners' knowledge, is a matter of first impression for this Court. The decision of the Court of Appeals undermines the judicial review provisions of the Administrative Procedure Act and the precedential value of several United States Supreme Court cases, including *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S. Ct. 888 (1991), and *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S. Ct. 2133 (1986). The Court of Appeals' decision eviscerates the purpose and spirit of both the Administrative Procedure Act and the Uniformed Services Employment and Reemployment Rights Act, and provides the FBI, the Central Intelligence Agency and the

other "Intelligence Community" agencies contemplated in section 4325 of USERRA with the seemingly unfettered discretion that USERRA was explicitly intended to curtail. Guidance is needed from this Court to define the scope of rights enjoyed by our citizen soldiers as set forth in these two vital statutes.

I.

DEFENDANT FBI'S MILITARY RESERVE POLICY IS JUDICIALLY REVIEWABLE PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT AND THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT.

While the United States, as sovereign, can only be sued with its consent, *see United States v. Mitchell*, 463 U.S. 206, 211 (1983), defendant, FBI's, policy and practice of restricting, and in many cases prohibiting, agent participation in reserve military training is justiciable by federal courts, as the United States has waived sovereign immunity under the Administrative Procedure Act. While there are two very narrow exceptions to judicial review of agency action under the APA, defendants did not meet their burden of proving by clear and convincing evidence that the applicable statutes preclude judicial review.

Under 5 U.S.C. §§ 701 *et seq.* (the Administrative Procedure Act, or "APA"), an individual "suffering legal wrong because of agency action . . . is entitled to judicial review thereof." *See* 5 U.S.C. § 702; *Christianson v. Hauptman*, 991 F.2d 59, 62 (2d Cir. 1993). The APA confers a general cause of action upon any individual "adversely affected or aggrieved by agency action within the meaning

of a relevant statute." 5 U.S.C. § 702.[5] "[I]t is clear that § 702 [of the APA] constitutes a waiver of sovereign immunity from such nonmonetary suits, and that district courts have jurisdiction over them under 28 U.S.C. §§ 1331 (general federal question), 1361 (action in the nature of mandamus) and 2201-2202 (declaratory judgment)." *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986). The APA directs the reviewing Court to hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion or contrary to law. 5 U.S.C. § 706(2)(A); *Christianson*, 991 F.2d at 62.

The APA is founded on the long-standing presumption that decisions by federal agencies are subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 838 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-141 (1967). In *Abbott Laboratories*, Justice Harlan explained that:

> The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "general review provisions" must be given a "hospitable" interpretation[.]

Id. at 140-41 (citations omitted).

The APA, of course, does not provide any substantive rights to an aggrieved employee. Rather, review of agency

---

5. 5 U.S.C. § 702 is set forth on p. 1, *supra*.

action under the APA requires an examination of the statute on which the claim of agency illegality is based. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (*citing Volpe*, *supra*; *Heckler*, *supra*).

USERRA was enacted to prohibit discrimination or acts of reprisal against individuals because of their past, current or future service in the Armed Forces of the United States. *See* 38 U.S.C. § 4301(a)(3) (1996); *Gummo v. Village of Depew*, 75 F.3d 98, 105 (2d Cir.), *cert. denied*, 116 S. Ct. 1678 (1996) (*citing* H.R. Rep. No. 65, 1994 U.S.C.C.A.N. 2449, 2451); *Yates v. Merit Systems Protection Board*, 145 F.3d 1480 (Fed. Cir. 1998). USERRA was designed to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions."[6] *Gummo*, 75 F.3d at 105. Petitioners submit that USERRA mandates that civilian employees who are members of the military Reserves, such as petitioners, shall be granted a leave of absence by their employer for the period of time required to perform Reserve military training. 38 U.S.C. § 4311(a) sets forth that:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service

---

6. The foundation of USERRA is the Veterans' Reemployment Rights Act ("VRRA"), 38 U.S.C. §§ 2021-27. The VRRA was amended by USERRA and renumbered 38 U.S.C. §§ 4301 *et seq.* Like USERRA, the VRRA required that civilian employers grant an employee a leave of absence for that period of time necessary to perform initial, active and inactive duty for training, whether the training is at the initiative of the reservist or at the initiative of the uniformed service. *See, e.g., Peel v. Florida Department of Transportation*, 443 F. Supp. 451, 453 (N.D. Fla. 1977).

> in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Further, upon such employee's release from active military service, USERRA mandates that such employee shall be returned to the same position the employee held before attending training, with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such training. 38 U.S.C. § 4316.

USERRA's provisions apply to performance of military service, whether voluntary or involuntary, and includes "active duty, active duty for training, initial active duty for training, inactive duty training, [and] full-time National Guard duty . . . ."

Pursuant to 38 U.S.C. § 4315, the provisions of USERRA explicitly apply to defendant, FBI. Defendant, FBI Director, is required to "prescribe procedures for ensuring that the rights under this chapter [38 U.S.C. § 4301 *et seq.*] apply to . . ." FBI agents. 38 U.S.C. § 4315(a). Section 4315(d)(1) sets forth that:

> Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

The above-enumerated statutory provisions, together with the presumption of judicial review of agency action, provide the necessary waiver of sovereign immunity, and set forth a congressional intent to subject the FBI's overall military reserve policy to review.

A. USERRA does not preclude judicial review of FBI policy

Under the APA, there are only two narrow exceptions to judicial review of agency action: (1) where a statute precludes judicial review; or (2) where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a); *Heckler*, 470 U.S. at 828. The government bears the burden of proving a legislative intent to restrict access to judicial review by clear and convincing evidence. *See Southern Railroad Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979); *Abbott Labs*, 387 U.S. at 141.

In affirming the dismissal of the case at bar, the Court of Appeals erroneously held that USERRA precludes judicial review. As a threshold matter, USERRA does not expressly provide that reemployment determinations by the FBI shall not be subject to judicial review. As the statutory language of sections 4315 and 4325 plainly indicates, it is only: (1) reemployment decisions (2) made pursuant to the detailed procedure set forth under section 4315 which are not subject to judicial review. *See* 38 U.S.C. § 4315(c)(3) ("A determination *pursuant to this subsection* shall not be subject to judicial review"); 38 U.S.C. § 4325 ("This section applies to any person who alleges that . . . *the reemployment* of such person" is not in accordance with law) (emphasis supplied).

The FBI's policy at issue here, however, is neither a "reemployment decision," nor is it a decision made pursuant to the procedure set forth in 38 U.S.C. § 4315, and thus does not fall under USERRA's very narrow exception to judicial review. The plain and unambiguous meaning of "reemployment" under sections 4315 and 4325 is that the employee was permitted to attend the training in the first place. The legislative purpose underlying USERRA, to prohibit discrimination or acts of reprisal against individuals because of their past, current or future service in the Armed Forces of the United States, and the entire statutory framework, would be rendered meaningless if an employee were not permitted to attend training. "Reemployment" presupposes a period of military training.

Indeed, under section 4311(a), "reemployment" is merely one of several acts in which discrimination is prohibited, including "initial employment," "retention in employment," "promotion" or "any benefit of employment." The proscription on judicial review in section 4315, and the implied preclusion deduced by the Court of Appeals from sections 4323, 4324 and 4325, is expressly limited to "reemployment" determinations.

In restricting, and in most cases prohibiting, agent participation in the reserve, the FBI is not entitled to rely on section 4315(c)(3). By not allowing its agents to attend reserve training in the first place, there can be no "reemployment determinations" as contemplated by the statute. Defendants' reliance below on the provision in section 4315 that "[a] determination pursuant to this subsection shall not be subject to judicial review" is inapplicable in this action challenging the FBI's military reserve policy.

The inference that the Court of Appeals drew from the statutory framework is unsupported by the plain, unambiguous language in §§ 4315(c) and (d) and 4325. Had Congress wished to preclude judicial review of the FBI's military reserve policy regarding "promotion," "retention in employment," or "initial employment," it would have said so in the section where it precluded judicial review of *reemployment* determinations by the agency. Instead, Congress explicitly inserted the following language: "nothing in . . . section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter." The "other substantive provisions," petitioners submit, is the right of an agent/reservist to attend weekend or summer training without being subjected to discipline by his or her employer.

In fact, writing to Congress on behalf of the United States Intelligence Community agencies in support of the above-enumerated provisions, Admiral William O. Studeman, United States Navy, explained that:

> [a]lthough it is very unlikely that a *returning* veteran or reservist would not be reemployed by an Intelligence Community agency, it is possible that a situation could occur where the reemployment of a *returning* veteran or reservist would be against the interests of the national security. For example, a sensitive matter, such as the handling of classified information while in active duty status, could conceivably raise such serious security issues that reemployment would not be in the interest of the United States.

See Senate Report No. 103-158, reprinted at 1993 WL 432576, at p. 196 (Leg. Hist.) (*emphasis added*).

Again, it is patently clear from such language that the most fundamental premise of the statute is that a reservist must be allowed to attend military reserve training and if necessary, active duty training, and that the limitations on judicial review applied only to reemployment determinations made by an Intelligence Community agency (including the FBI). The Court of Appeals' decision ignored this crucial distinction.

As previously noted, the crux of the instant action is that the FBI's overall policy contravenes petitioners' rights as secured by USERRA.[7] Petitioners do not challenge in this

---

7. In reviewing the current "revised" FBI military reserve policy, it is respectfully pointed out that the current policy is in actuality comprised of several components, each of which should be analyzed separately to determine whether it is subject to judicial review and conforms to the mandate set forth in USERRA. First, Special Agents who are members of the Standby Reserve may request permission from their supervisor (or "SAC") to attend both active duty for training (two-week annual training) and inactive duty for training (weekend "drill"), and this request will be denied if, in the SAC's opinion, "granting the request would unreasonably and adversely affect Bureau operations." (The "Standby Reserve policy"). Second, Special Agents are prohibited from being in the Ready Reserve and are instead only permitted to join the Standby Reserve. As a condition of their employment with defendant, FBI, new agents must either resign their military commissions or otherwise transfer to the Standby Reserve. (The "Ready Reserve policy"). Third, Special Agents are not allowed to newly enlist in a Reserve component. Lastly, the current policy of allowing agents, as Standby Reservists, to request permission to attend training is only temporary, and the FBI's prior policy of completely prohibiting any military training may be reinstated by the FBI at any time. Plainly, these aspects of the FBI's policy are not "reemployment determinations" such that the preclusion provisions apply to preclude

(Cont'd)

proceeding individual "reemployment determinations" by the FBI. Nor do they challenge individual denials of an agent's request to attend military reserve training. Petitioners challenge the FBI's contention that it can subject employees to discipline, including job forfeiture, for attending military reserve training. Petitioners challenge the FBI's contention that it can prevent an employee from being a reservist, where Congress has explicitly recognized the crucial role the reserve forces play in our society and the vital services they provide for our country, and has passed legislation explicitly applicable to the FBI. The instant action challenges the FBI's past and present temporary policy as a whole, and petitioners seek to ensure that defendants are acting in accordance with USERRA when the temporary policy expires in 2002.

B. The decision of the Court of Appeals conflicts in principle with the Supreme Court's decision in *McNary v. Haitian Refugee Center* and its progeny

What the Court of Appeals decided was that despite the explicit statutory provisions prohibiting discrimination against reservists, coupled with explicit provisions making USERRA applicable to the FBI, FBI prohibition of agent participation in the military reserve is nonreviewable and in the unfettered discretion of an agent's supervisor, and ultimately, the defendant Director. In short, no one, not an

---

(Cont'd)
the instant challenge. It is untenable that sections 4315 and 4325 can impliedly preclude review over every aspect of the FBI's military reserve policy. Even assuming that reemployment determinations by the FBI are not subject to judicial review, this would not otherwise conflict with allowing agents to seek to compel the FBI to allow agents to attend military reserve training without the specter of adverse action from his/her employer.

individual or an organization or any agency, can seek judicial review of the FBI's policy. This would be a frightening anomaly.

Petitioners respectfully submit that the Court of Appeal's ruling significantly erodes the precedential value of this Court's decisions in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S. Ct. 888 (1991), and its progeny. In those cases, the Court held that even express statutory preclusions of judicial review did not preclude judicial review of the administrative regulations and general policies underlying those determinations. *See Universal Health Services of McAllen, Inc. v. Sullivan*, 770 F. Supp. 704, 711-12 (D.D.C. 1991).

At issue in *McNary* was a challenge to the manner in which the Immigration and Naturalization Service ("INS") was administering the "Special Agricultural Workers" amnesty provisions ("SAW Program") of the Immigration Reform Control Act ("the Reform Act"). In substance, the SAW Program allowed alien farm workers who had performed at least ninety days of agricultural work in the United States to apply to the Attorney General for SAW status, which allowed them to eventually become aliens lawfully admitted for permanent residence. The Reform Act expressly precluded judicial review of a final determination of SAW status by the Attorney General. *McNary*, 498 U.S. at 485. Unsuccessful applicants could seek judicial review of a denial of SAW status only where the INS had initiated deportation proceedings against the applicant. *Id.* at 486.

Plaintiffs, the Haitian Refugee Center, among others, commenced an action in United States District Court on behalf of a class of alien farm workers who either had been or would be injured by alleged unlawful practices and policies adopted

by the INS in its administration of the SAW Program. Plaintiffs alleged *inter alia* that the interview process was arbitrary and capricious and deprived applicants of their due process rights as secured by the Fifth Amendment. *Id.* at 487.

Despite the express statutory preclusion of judicial review, both the District Court and the Court of Appeals for the Eleventh Circuit found that they had jurisdiction over the action because the complaint "does not challenge any individual determination of any application for SAW status but rather attacks the manner in which the entire program is being implemented[.]" *Id.* at 488.

This Court affirmed, holding that the express preclusion of judicial review did not apply to plaintiffs' action, as plaintiffs were not challenging the merits of any individual SAW status application but instead were contending that INS' policies and practices in processing SAW applications deprived them of their statutory and constitutional rights. *Id.* at 492. As a threshold matter, the Court looked at the express statutory language precluding judicial review "of a determination respecting an application for adjustment of status." The Court explained that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.*

The *McNary* Court noted, moreover, that:

> had Congress intended the limited review provisions of § 210(e) of [the Reform Act] to encompass challenges to INS procedures and practices, it could easily have used broader statutory language.

* * *

> Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired[.]

Id. at 494. The *McNary* Court thus concluded that Congress did not intend to bar application of this Court's broader doctrine that differentiates between broad statutory or constitutional challenges to an agency's policies, and narrow challenges to an agency's application of the facts of an individual case. The Court held that "it therefore seems plain . . . that restricting judicial review . . . is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497. *See also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 64 (1993) ("Although the phrase 'a determination respecting an application for adjustment of status' could conceivably encompass a Legalization Assistant's refusal to accept the application for filing . . . nothing in the statute suggests, let alone demonstrates, that Congress was using 'determination' in such an extended and informal sense.").

Similarly, in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S. Ct. 2133 (1986), this Court, in rejecting the government's contention that a statutory preclusion of Medicare amount determinations implied a general preclusion of judicial review, held that the statutory preclusion "simply does not speak to challenges mounted against the method by which such amounts are to be determined rather than the determinations themselves." *Bowen*, 476 U.S. at 675. *See also Universal Health Services*, 770 F. Supp. at 711 (despite express statutory provision that hospital reclassification determinations by the Department of Health and Human Services "shall be final and shall not be subject to judicial

review[,]" judicial review of the guidelines utilized in making such determinations is not precluded: "[plaintiff] does not ask the Court to intervene in the reclassification process, but rather to review the validity of the guidelines underlying that process.").

Block v. Community Nutrition Institute, 467 U.S. 340, 104 S. Ct. 2450 (1984), relied upon by the Court of Appeals here, is not to the contrary. In *Block*, the Supreme Court held that the structure of the milk price subsidy scheme created by the Agricultural Marketing Act of 1937 precluded consumer challenges to the Secretary of Agriculture's determination of minimum milk prices. *Block*, 467 U.S. at 352-53.

The *Block* Court overcame the strong presumption in favor of judicial review, but only upon a finding, however, that Congress had explicitly empowered milk "handlers" to seek judicial review of the Secretary's determinations. The Court held that:

> preclusion of consumer suits will not threaten realization of the fundamental objectives of the statute. Handlers have interests similar to those of consumers. Handlers, like consumers, are interested in obtaining reliable supplies of milk at the cheapest possible prices . . . [h]andlers can therefore be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated.

Block, 467 U.S. at 352. *Block* thus left open the right to challenge the validity of the administrative action. The Court determined, moreover, that consumer suits would in actuality frustrate the complex, cooperative regulatory scheme which was intended to benefit consumers. *Id.*

In contrast, here, the Court of Appeals' decision ensures that no group or individual can seek judicial review of the FBI's policy. Once it is held that FBI Special Agents cannot challenge the FBI's military reserve policy or the manner in which the entire program is being implemented, there exists no other group with any interest or authority to challenge FBI policy. The FBI is left free to entirely disregard with impunity a clear Congressional mandate.

Further, there is no basis to conclude that a challenge to the FBI's policy would frustrate the underlying purpose of USERRA. Rather, a challenge such as the case at bar is the only method to ensure that the FBI is in compliance with USERRA's substantive provisions. As in *McNary*, adopting the Court of Appeals' ruling in the case at bar "is the functional equivalent of a total denial of judicial review[.]" *See McNary*, 498 U.S. at 497.

Defendants repeatedly averred to their designation of all agents as "key federal employees," ostensibly in support of their position that they have the discretion to prohibit military reserve training. Petitioners have consistently alleged that defendants' Standby Reserve policy directly contravenes the applicable DOD regulations governing the transfer of "key federal employees" from the Ready Reserve to the Standby Reserve. Pursuant to DOD Directive 1215.6 (January 31, 1974), reservists who have been screened to the Standby Reserve as "key federal employees" have the right to attend active and inactive duty for training to maintain their equity in the reserve system. DOD Directive 1215.6 does not permit the FBI to forbid voluntary active or inactive duty for training. Rather, the Directive explicitly recognizes that in exchange for their involuntary transfer to the Standby Reserve, the employee will be allowed to continue training as a Standby Reservist, except that the reservist has no mobilization potential.

Based on this Court's holdings in *McNary* and *Bowen*, it is well-settled that statutory preclusions of judicial review do not preclude judicial review of the administrative regulations underlying those determinations. The FBI's wholesale designation of all Special Agents as "key federal employees," ostensibly pursuant to the applicable regulations, and upon which they attempt to justify their policy, is therefore properly subject to judicial review under the Administrative Procedure Act.[8]

The Secretary of Defense has determined that certain federal positions are, by definition, "key positions" and must be transferred to the Standby Reserve, including: the Vice President; members of Congress; any official in the order of presidential succession; and all federal judges. This list is indicative of the level of importance of the employees to be considered "key" for purposes of screening to the Standby Reserve. With this illustrative list as a starting point, the heads of federal agencies may designate which positions are "key positions." 32 C.F.R. § 44.3(e)(3). The regulations governing classification of employees as "key federal employees" for the purposes of transferring the employee to the Standby Reserve sets forth that such classification is to be done on a case-by-case basis. *See, e.g.*, 32 C.F.R. § 44.5; Army Regulation 135-133, Chapter 2, § III ("A key employee is any Federal employee who occupies a key position that cannot be vacated during a

8. Nevertheless, whether FBI agents are "key federal employees" is immaterial to the issue of whether the FBI can deny agents their right to train as members of the Standby Reserve. Assuming *arguendo* that the FBI has rationally determined that all Special Agents are "key federal employees," such that they are required to transfer from the Ready Reserve to the Standby Reserve, this designation does not provide the FBI with discretion to then deny agents their right to attend training as members of the Standby Reserve.

national emergency or mobilization without *seriously* impairing the capability of the parent Federal agency or office to function effectively."). Section 2-10(c) requires a case-by-case determination and designation.

There is no indication in the regulations, other than those *per se* categories listed above (*i.e.*, the Vice President and federal judges), which allows all agents of an agency to be designated "key," thus depriving them of the opportunity to train in the Ready Reserve. The FBI's wholesale classification of all Special Agents as "key" is entirely improper, and has been undertaken without even the most minimal investigation or analysis of the actual duties performed by Special Agents. The FBI has never even bothered to determine how many agents are actually in the reserve. (*See* Declaration of James Oppy, at JA-47a). They would be hard-pressed to explain how the capabilities of the FBI would be "seriously impaired" when they do not even know if out of approximately 12,000 Special Agents employed by the FBI, the 96 plaintiffs in the instant case are the only agents who remain affiliated with the Standby Reserve. While it is understandable that the United States cannot afford to have its members of Congress deployed during wartime, for obvious reasons, it is entirely unreasonable to maintain that the FBI's capabilities would be seriously impaired if, hypothetically speaking, 1-5% of its agents were deployed. Defendants' self-serving contention that their statutory mission would be compromised if agents were permitted to serve in the Ready Reserve is without basis in fact. While the "key federal employee" designation can be utilized on a case-by-case basis for members of tactical response teams, such as the Special Weapons and Tactics ("SWAT") teams and Hostage Rescue Teams, and who are truly on 24-hour standby notice, or Foreign Counter- Intelligence units, it is unreasonable to apply the term unilaterally to those agents who serve on white collar criminal

squads, and other agents who essentially serve in a nine-to-five, Monday-to-Friday capacity, and who are not attached to foreign counter-intelligence units.[9]

In all of these alternatives, the FBI can retain its capability to effectively carry-out its statutory mission while allowing the agent reservist the ability to preserve their equity in the military retirement and pension system in a fair and equitable manner. The FBI, however, has never considered such options but has instead attempted to essentially force the agent out of the reserves by making it prohibitively expensive for the agent to continue his affiliation in the Standby Reserve, and making it nearly impossible for the agent reservists to be promoted.

The FBI would be equally hard-pressed to explain how their statutory mission would "significantly impaired," in light of the fact that they are perhaps the only United States agency to forbid all of their agents from full reserve participation. Defendant, FBI, stretches credibility by attempting to show how the FBI, as opposed to these other agencies, with equally sensitive law enforcement, intelligence and foreign counter-intelligence functions, is burdened by allowing plaintiffs to serve in the Ready Reserve. It is utterly irrational that while Special

---

9. In addition, there are Troop Program Units (or "TPUs") within the Ready Reserve, such as Garrison Support Units, which are non-deployable, not subject to mobilization during wartime, and thus pose no threat to FBI emergency operational capabilities. Further, Special Agents can belong to the Individual Ready Reserve ("IRR") in an Individual Mobilization Augmentee position, in which the agent reservist can earn retirement points and be reimbursed for expenses incurred during military training. This would eliminate the undue financial hardship imposed on agents presently relegated to the Standby Reserve, who must train without pay and at their own expense. Members of the "IRR" are not assigned to a Selected Reserve Unit and thus are not subject to mobilization as other Ready Reservists are.

Agents in these agencies fully participate in the Ready Reserve, an FBI Special Agent working, for example, as a legal advisor or a training instructor, would erode the FBI's capabilities if allowed to participate in the Ready Reserve, particularly in a capacity which is not subject to mobilization during wartime.

In short, nothing in USERRA or the applicable regulations prohibits judicial review of the FBI's designation, ostensibly pursuant to 32 C.F.R. § 44.5 and DOD Directive 1215.6, of all agents as "key federal employees" and their significant restrictions of an agent's right to attend military training based on such erroneous designation. *See McNary*, 498 U.S. at 485-494; *Bowen*, 476 U.S. at 667; *Universal Health Services*, 770 F. Supp. at 712.

The Court of Appeals' decision will have a chilling effect on the enforcement of employee rights and will foreclose the necessary escape route employees have from bureaucracy's "iron cage." *See, e.g.*, *Christianson v. Hauptman*, 991 F.2d 59, 63 (2d Cir. 1993) (ruling that "[i]f this Court were to accept the Service's argument, we would be unable to judicially review such actions. In our society, judicial review provides an important escape route from bureaucracy's iron cage.") The Court of Appeals' decision will eviscerate the purpose and spirit of both the Administrative Procedure Act and the Uniformed Services Employment and Reemployment Rights Act and provide the FBI, the Central Intelligence Agency and the other "Intelligence Community" agencies listed in section 4325 of USERRA with the seemingly unfettered discretion that USERRA was explicitly intended to curtail. Without judicial intervention in this matter, the FBI is empowered to return to its past policy of completely prohibiting all military training, in patent violation of USERRA, with no judicial avenue of recourse.

Petitioners do not seek the conferral of any special rights, but rather seek the recognition of their right to make further sacrifices and to further serve the citizens of the United States. The decision of the Court of Appeals, if left undisturbed, will forever foreclose that right. This Court's holding in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1986), is particularly apt here:

> equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

RICHARD A. DIENST
Counsel of Record
JAMES M. MOSCHELLA
DIENST & SERRINS, LLP
Attorneys for Petitioners
233 Broadway, 18th Floor
New York, New York 10279
(212) 406-1700

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 28, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: January 22, 1999) Decided: SEP 28 1999

Docket No. 98-6102

JOHN R. DEW, on behalf of himself and other Special Agents of the Federal Bureau of Investigation listed below; MICHAEL F. AIESI; PAUL D. ALLEN, JR.; KENNETH ANDREWS; JEFF ANGELOS; DAVID O. BAILEY; THOMAS J. BARRETT; BRUCE BLACK; PETER S. BOBINSKI; DOUGLAS H. BRIGANTE; ROBERT A. BURKES; THOMAS J. CAMPBELL; DAVID E. CARMAN; DAVID S. CAVANAUGH; DONALD J. CESARE; RONALD H. CIZMAR; RONALD H. CLEAVER; FORD W. COLE; GEORGE W. CONNELL, III; JAMES N. CORCORAN; MARC J. DALLACROCE; RICHARD S. DEMBERGER; TODD V. DI FEDE; JAMES E. DIACZYSZYN; PATRICK J. DONNELLY; JOHN K. DONOVAN; PAUL DOYLE; ROGER G. EATON; MARK V. EILER; LEO FARRELL; ROBERT A. FIATAL; PERRY A. FORGIONE; RAYMOND J. GANNON; CHARLES W. GIANNETTI; TERRENCE D. GIBSON; WILLIAM F. GITTINS; ANTHONY R. GORDON; DANIEL GORMAN; ERIC L. GRAFF; GARY GRAFF; RUSSELL L. GREGORY; MICHAEL P. GRIFFIN; JAMES M. HARRIS; MICHAEL J. HARRISON; NEIL D. HEINER; GREGORY

Appendix A

A. HENDRICKSON; CLIFFORD C. HOLLY; JOHN J. KANE; JACK KELLEHER; PHILIP KING, III; STEPHEN KODAK, JR.; DAVID KOLLENDER; JAMES M. LAVERICK; PAUL A. LE VEILLE; HOWARD A. LEADBETTER, II; MARK B. LIBMAN; DOUGLAS E. LINTER; RODNEY S. LOOSE; WAYNE D. LORD; MARK S. LOVE; PATRICK T. LUZIO; GUY L. MARANGONI; ROBERT C. MARSHALL; ROBERT S. McCORKLE; MARTIN McCULLOUGH, II; RANDY MONDOR; JOHN G. NEMEC; LAURENCE H. NEWTON; JOHN M. O'NEILL; CROCKETT W. OAKS, III; ENRIQUE OLIVAS; DAVID A. PALLADINO; CHARLES A. PARDEE; MANUEL PEREZ; JEFFREY S. PFEIFFER; MARK T. POST; REGINALD D. POWELL; L. PREDTECHENSKIS; ALVIE L. PRICE; CHARLES W. PROVINE; PETER J. RONAYNE; WILLIAM W. RUSS; RICHARD D. SCHWEIN, JR.; DONALD C. SHEEHAN; DAVID R. SMITH; UNA D. STANTON; JOHN E. STOLL; GERARD A. SULLIVAN; QUINN J. TAMM, JR.; DANIEL H. TEJEDA; KEVIN L. THEEDE; ROBERT C. THOMPSON; RICHARD G. WALLACE; BRIAN E. WHITE; CARL V. WIGHOLM; DONALD J. ZEMBIEC,

Plaintiffs-Appellants,

– vs –

UNITED STATES OF AMERICA; FEDERAL BUREAU OF INVESTIGATIONS, LOUIS FREEH, Individually, and as Director of the Federal Bureau of Investigations; MICHAEL R. BROMWICH, Individually, and as the Inspector General, United States Department of Justice;

Appendix A

JANET RENO, Attorney General of the United States of America; UNITED STATES DEPARTMENT OF JUSTICE; WILLIAM S. COHEN, Secretary of the United States Department of Defense; THE UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

Before: LEVAL and POOLER, *Circuit Judges,* and CURTIN, *District Judge.**

* * *

CURTIN, *District Judge*:

Plaintiffs, ninety-six permanently appointed Special Agents of the Federal Bureau of Investigation ("FBI"), appeal from a judgment entered in the United States District Court for the Southern District of New York (McKenna, *J.*) dismissing, pursuant to Fed. R. Civ. P. 12(b)(1), plaintiffs' claim that defendants violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq*. The court granted the motion after finding that plaintiffs' claim was subject to administrative review under the USERRA, and as such, plaintiffs should have filed an internal grievance with the FBI before filing their federal court action. Because plaintiffs failed to do so, the court found that plaintiffs had not exhausted their administrative remedies, and therefore the court lacked subject matter jurisdiction to hear the action.

---

* The Honorable John T. Curtin, Senior United States District Judge for the Western District of New York, sitting by designation.

Appendix A

As set forth below, we affirm the judgment, but on different grounds than those articulated by the court below.

BACKGROUND

The Parties

Plaintiffs are Special Agents of the Federal Bureau of Investigation ("FBI") who are current, prospective, or future members of the military Reserves of the Armed Forces of the United States ("Armed Forces"). Plaintiffs claim that defendants, the United States of America, the FBI and its Director Louis Freeh, the Department of Justice, Janet Reno as Attorney General of the United States, Michael Bromwich as the Inspector General of the Department of Justice, the Department of Defense, and William Cohen as Secretary of Defense, drafted or approved the 1996 FBI military service policy, which unlawfully prohibits Special Agents of the FBI from serving in the Ready Reserve.

The Reserves

The Reserves of the Armed Forces consist of the Army National Guard, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. There are three organizational categories within Reserve Units: the Ready Reserve, the Standby Reserve, and the Retired Reserve. *See* 10 U.S.C. § 10141(a). The category corresponds to the priority under which members will be called into active duty in time of war or national emergency. *See* 10 U.S.C. § 2301. The categories also differ as to the extent of yearly training

required, available pay, and benefits. For this case, we need only consider the distinction between Ready Reservists and Standby Reservists.

Ready Reservists are required to participate in at least forty-eight scheduled training periods per year (called "Inactive Duty for Training" or "drills"). Ready Reservists must also serve on Active Duty Training ("ADT") for at least fourteen days per year. When mobilized, Ready Reservists may be required to report for active duty on very short notice. 32 C.F.R. § 76.6(e)(1). Members of the Ready Reserve are paid for their work and also receive points toward military retirement benefits.

Standby Reservists are volunteers who cannot be involuntarily called into active service in time of war or national emergency unless it is first established that there are not enough Ready Reservists available. *See* 10 U.S.C. §§ 12301, 12306. A member of the Standby Reserve serves on either the Active Status List or Inactive Status List. *See* 10 U.S.C. §§ 10152, 10153. Members of the Standby Reserve on Active Status may be called into active duty in time of war or national emergency, if needed, but are not obligated to participate in any yearly training sessions. *See* 10 U.S.C. § 12301(a). Standby Reservists who volunteer to participate in training sessions are not paid, but do earn credit toward military retirement.

Standby Reservists on the Inactive Status List are subject to the limited call-up obligations applicable to all reservists, and thus may not be called into active service in time of war or national emergency unless it is first determined that there

are not enough Standby Reservists on Active Status. Standby Reservists on Inactive Status are not authorized to train, nor are they eligible for remuneration or military retirement.

Screening The Reserves

The mobilization of the Ready Reserve to active military service results in a concomitant loss of personnel from civilian employment. As such, Congress mandates that the Ready Reserve be continuously screened to ensure that, among other things, there are not a large number of members with "critical civilian skills," and that there are no members "whose mobilization in an emergency would result in an extreme . . . community hardship." 10 U.S.C. § 10149(a). Pursuant to 10 U.S.C. § 10149(b), those Reservists screened from the Ready Reserve are either (1) transferred to the Standby Reserve; (2) discharged; or (3) transferred, if eligible, to the Retired Reserve. 10 U.S.C. § 10149(b).

Congress delegated the authority of screening the Reserve to the President who, in turn, delegated that authority to the Secretary of Defense pursuant to Executive Order, 11190. *See* 10 U.S.C. § 10149(a). The Secretary of Defense issued regulations that require the designation and screening of "key" federal positions. *See* 32 C.F.R. § 44.5(b)(2). Specifically, the regulations noted that "[s]ome Federal employees occupy positions that cannot be vacated during a national emergency or mobilization without *seriously* impairing the capability of their agency to function effectively." 32 C.F.R. § 44.5(b)(2)(i). The regulations authorize each "Federal agency head" to determine the positions within the agency that constitute "key positions,"

and ensure that those positions are not filled by members of the Ready Reserve. *See id.*

The FBI's Policy on Military Service

For at least forty years, the Director of the FBI has prohibited Special Agents from serving in the Ready Reserve by designating the Agents "key federal employees."[1] The Attorney General of the United States ratified this designation in 1980, observing that it was "absolutely necessary that the FBI be fully prepared during a national emergency to immediately assume its foreign counterintelligence, sabotage and neutrality responsibilities." Declaration of James Oppy ¶ 5. However, Special Agents were allowed to serve in the Standby Reserve, but were prohibited from participating in ADT.

In 1994, Congress enacted USERRA, which prohibits employment discrimination on the basis of military service. *See* 38 U.S.C. § 4301, *et seq.* USERRA provides that: "[a] person who is a member of . . . a uniformed service shall not be denied . . . retention in employment . . . on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. § 4311(a). USERRA further provides that "[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter." 38 U.S.C. § 4311(b) (Supp. 1999).

---

1. All other FBI employees are free to join the Reserve in any capacity and receive all the benefits and compensation which such service provides.

Appendix A

In light of Congress' enactment of USERRA, the FBI, in 1996, issued a new policy on military service. Under the new policy, Special Agents are still prohibited from serving in the Ready Reserve, but may volunteer to serve on either the Active Duty List or Inactive Duty List of the Standby Reserve. An Agent who wishes to volunteer for ADT must request and receive authorization from his or her supervisor or division head. Decl. of James Oppy ¶ 6. The supervisor or division head retains the right to deny the petition if granting the request would unreasonably and adversely affect FBI operations. Agents approved for ADT are entitled to take up to 15 days of military leave per year and will continue to receive federal pay during such leave. *See* Department of Defense Directive 1215.6; *see also* Memorandum from FBI Director Louis Freeh (Aug. 29, 1996). A denial of a request for military service may be appealed to the Deputy Director of the FBI.

On August 27, 1999, plaintiffs filed the present suit in the Southern District of New York. Plaintiffs' complaint alleged that the FBI policy violated USERRA, the Second Amendment to the United States Constitution, and the Leave with Pay Law, 5 U.S.C. § 6323. Defendants moved to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Judge McKenna granted defendants' motion to dismiss. *See Dew v. United States*, No. 97-6409, 1998 WL 159060, at *3 (S.D.N.Y. Mar. 27, 1998). In doing so, Judge McKenna determined that unlike "employees of 'States' or 'private employers,' who may file claims in federal district court, USERRA requires that an aggrieved FBI employee proceed

along administrative channels by submitting a grievance under the Act to the inspector general of the agency." *Id.* at *3. Because plaintiffs failed to appeal a denial of leave for military service to the Inspector General or Deputy Director of the FBI (the officials designated to hear such appeals), Judge McKenna determined that plaintiffs never exhausted their administrative remedies. *See id.* at *4. Judge McKenna also determined that plaintiffs' claims under the Leave with Pay Law and Second Amendment failed to state a claim. *See id.* at *5-*6. On appeal, plaintiffs only challenge the district court's finding as it pertains to USERRA.

DISCUSSION

Standard of Review

We review a decision of the district court to dismiss a complaint under Fed. R. Civ. P. 12(b)(1) *de novo*. *Anderson v. State University of New York*, 169 F.3d 117, 119 (2d Cir. 1998). Under these rules, the court must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff. *Jaghory v. New York State Dep't. of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997).

In the present case, the district court found that plaintiffs failed to exhaust their administrative remedies, thus making the assumption that under USERRA the FBI's policy on military service was subject to judicial review. For the reasons set forth below, we believe the district court's assumption or interpretation of USERRA was flawed.

Appendix A

Sovereign Immunity

Although the district court dismissed plaintiffs' USERRA claims because they had not exhausted available administrative remedies, defendants maintain, as an initial matter, that plaintiffs cannot sue them because the United States has not waived sovereign immunity for USERRA claims by FBI employees. Plaintiffs suggest that Congress waived sovereign immunity for claims such as theirs in section 702 of the Administrative Procedure Act ("APA").

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The APA waives sovereign immunity for actions "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority . . . ." 5 U.S.C. § 702. The APA does not waive sovereign immunity "where a matter is statutorily committed to agency discretion or where another statute provides a form of relief which is expressly or impliedly exclusive." *Sprecher v. Graber*, 716 F.2d 968, 974 (2d Cir. 1983) (internal quotation marks omitted); *see also* 5 U.S.C. § 701 (APA does not apply where "statutes preclude judicial review" or "agency action is committed to agency discretion by law").

Here, plaintiffs do seek damages, and the APA clearly does not waive sovereign immunity for those claims. *See* 5 U.S.C. § 702. With respect to plaintiffs' claims for declaratory and injunctive relief, defendants argue both that USERRA precludes judicial review of these claims and that

the FBI's decisions were committed to its discretion. We agree with defendants that USERRA precludes judicial review of plaintiffs' claims; and thus, we affirm the district court's dismissal.

USERRA

"Whether and to what extent a particular statute [provides or] precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

1. Statutory Scheme

"In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block*, 467 U.S. at 349. Although there is a "presumption" in favor of judicial review of agency action, this presumption may be overcome when a congressional intent to preclude judicial review is "fairly discernible" in the statutory scheme. *Carlyle Towers Cond. Ass'n v. FDIC*, 170 F.3d 301, 306 (2d Cir. 1999) (quoting *Block*, 467 U.S. at 351).

A review of USERRA's structure reveals that it was clearly Congress' intent to preclude judicial review of USERRA claims by the employees of the intelligence community. A comparison of sections 4323 and 4324 to

section 4325 reveals that Congress deliberately chose not to allow the employees of federal intelligence agencies to sue their employers in federal district court for violations of USERRA. Section 4323(b) of the Act specifically addresses federal jurisdiction over USERRA actions by state or private employees. Specifically, subsection (b) confers federal jurisdiction over cases "against a State (as an employer) or a private employer commenced by the United States" and over actions "against a private employer by [any] person." 38 U.S.C. § 4323(b)(1) and (3). The subsection also grants State courts jurisdiction over cases brought by any person against a State as an employer. 38 U.S.C. § 4323(b)(1)(3).

Section 4324 of USERRA applies where the employer is a "Federal executive agency" (a phrase defined at 38 U.S.C. § 4303(5) to exclude the FBI and other intelligence community agencies mentioned in 5 U.S.C. § 2302(a)(2)(c)(ii)). Section 4324 does not authorize a private USERRA action against the Federal Government, as an employer, in federal district court; rather, it confers jurisdiction upon the Merit Systems Protection Board ("MSPB"). *See* 38 U.S.C. § 4324(b); *see also Yates v. MSPB*, 145 F.3d 1480, 1483 (Fed. Cir. 1998). The MSPB is authorized to determine whether a Federal executive agency has complied with USERRA and, if necessary, to compel that agency's compliance with the statute. *See* 38 U.S.C. § 4324(c)(2) (Supp. 1999). Decisions of the MSPB are subject to review in the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. § 4324(d).

Section 4325 of the statute applies to "any person who alleges that the reemployment of such person" by an agency

referred to in 5 U.S.C. § 2302(a)(2)(c)(ii), violated USERRA. 38 U.S.C. § 4325(a)(1). However, unlike section 4323, section 4325 does not authorize covered employees to commence an action in federal or state court; unlike section 4324, section 4325 does not authorize a complaint to the MSPB, subject to appellate review. Section 4325 provides only that employees of federal intelligence community agencies may pursue reemployment rights by submitting a claim to the inspector general of the agency. *See* 38 U.S.C. § 4325(b). Section 4315(c)(3) provides that the agency's initial decision regarding employment "shall not be subject to judicial review," and section 4325(b) provides that when an employee submits a grievance regarding that decision to the agency inspector general the inspector general "shall investigate *and resolve* the allegation pursuant to procedures prescribed by the head of the agency." 38 U.S.C. § 4325(b) (emphasis added). The section prescribes no further review of any kind. Although section 4315 states that except as specified in that section, "nothing [in the act] shall be construed to exempt any [intelligence] agency" from the act's "substantive" provisions, 38 U.S.C. § 4315(d)(1), the act does not empower courts to enforce the act's substantive provisions against the agencies. *See also* 38 U.S.C. § 4315(a) ("The head of each [intelligence] agency . . . shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.")

Thus, while section 4323 of USERRA expressly authorizes a civil enforcement action against state and private employers, and section 4324 allows review by the Courts of Appeal of MSPB decisions concerning certain federal

agencies, section 4325 omits a similar civil enforcement scheme for FBI employees.

Furthermore, in *United States v. Fausto*, 484 U.S. 439 (1988), a case which resembles the case at bar, the Supreme Court held that the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, *et seq.*, precluded judicial review of suspensions of nonpreference excepted service federal employees. The Court reasoned:

> The comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review . . . combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action [at issue].

Id. at 448. Because USERRA carefully addresses the rights of federal intelligence agency employees, yet does not include them in provisions for judicial review, we believe that judicial review of plaintiffs' claims is precluded by USERRA.

2. Legislative History

An analysis of the legislative history only confirms our conclusion that Congress intended to preclude judicial review of the FBI's compliance with USERRA. In September 1991, a version of USERRA which provided for enforcement against federal agencies by the MSPB was under

consideration by the Senate. *See* S. Rep. No. 102-203 (1991), *reprinted in* 1991 WL 243411 (Leg. Hist.). Members of the federal intelligence community ("IC") agencies (i.e., the Central Intelligence Agency, the FBI, the National Security Agency, and the Defense Intelligence Agency) objected to the proposed legislation, observing that "[t]hese proposed enforcement mechanisms therefore pose . . . significant national security concerns." Letter from William H. Webster, Director of Central Intelligence, to Honorable Alan Cranston, Chairman, Committee on Veterans' Affairs, dated June 11, 1991, *reprinted in* S. Rep. No. 202-203 at 111 (1991).

Specifically, the IC agencies maintained that the legislation's provision for external enforcement by the MSPB would be "inconsistent with the current legal framework, which protects from outside review the hiring and firing decisions in the national security context and existing IC agency personnel practices and procedures in national security matters." *Id.* Observing the importance of maintaining "necessary flexibility in hiring/firing decisions made in the interest of national security," and expressing a preference for "internal procedural safeguards," the IC agencies proposed amending USERRA so as to "relieve them from the law's external enforcement mechanisms." 1991 WL 243411, at 274-75.

In response to the IC's concerns, the Senate proposed new language for USERRA which ultimately evolved into sections 4315 and 4324 of the Act. *See* Joint Explanatory Statement on H.R. 995 Pub. L. 103-353, 103rd Cong., 2d Sess., *reprinted in* 1994 U.S.C.C.A.N. 2500. Based on this legislative history, we believe that in amending USERRA,

Congress clearly intended to insulate the military service policies of the IC agencies from external review.

Plaintiffs argue that defendants have failed to dispel the "presumption" favoring judicial review, or in the alternative that due to the fact that USERRA pertains to veterans, the Act should be liberally interpreted to permit judicial review. We have considered the above arguments and find them to be without merit. Accordingly, we hold that USERRA does not provide federal courts with subject matter jurisdiction to hear cases involving the FBI's military service policy.

CONCLUSION

For the above reasons, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 27, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 6409 (LMM)

JOHN R. DEW, *et al.*,

Plaintiffs,

– against –

UNITED STATES OF AMERICA, *et al.*,

Defendants.

MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiffs, Agents employed by the Federal Bureau of Investigation ("FBI") and past, present or prospective members of the Reserve components of the United States Armed Forces, bring this action alleging that they have been deprived of their rights under 38 U.S.C. § 4301 *et seq.*, the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), under 5 U.S.C. § 6323 ("Leave with Pay Law"), and under the Second Amendment to the United States Constitution ("Second Amendment"), to participate in either initial active duty for training, active

duty for training ("ADT"), or inactive duty for training ("IDT") as members of the Ready Reserve components of the United States Armed Forces. Defendants move to dismiss the complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the Court grants defendants' motion to dismiss plaintiffs' USERRA claim for lack of subject matter jurisdiction. The Court also grants defendants' motion to dismiss plaintiffs' claims under the Leave with Pay Law and the Second Amendment for failure to state a claim upon which relief can be granted.

I. BACKGROUND

The facts of the complaint when construed in the light most favorable to plaintiffs, the non-movants, are as follows:

The Armed Forces of the United States are organized into Active Duty components and Reserve components. (Compl. ¶ 11). The Reserve components are composed of two further categories: the Ready Reserve and the Standby Reserve. (Compl. ¶ 12). Members of the Ready Reserve are required to participate in at least 48 scheduled training periods (IDT or "drills") per fiscal year and must also serve on ADT for at least 14 days per fiscal year. Members of the Ready Reserve are paid by the Department of Defense for this service and earn "points" towards retirement. (Compl. ¶ 13). According to plaintiffs, a Reservist must accumulate 50 of these points per year in order to have the year qualify for retirement purposes. *Id.* Plaintiffs allege that

a member of the Ready Reserve who trains in a given year with a Reserve Unit or with an active duty unit will accumulate 50 points during that year. (Compl. ¶ 50).

Like the Ready Reserve, the Standby Reserve consists of two classes: the Active Status List and the Inactive Status List. A member of the Standby Reserve who is on the Active Status List may preserve her or his standing in the Reserve System and earn retirement points by volunteering, without pay and at his own expense, to participate in active and/or inactive duty training. (Compl. ¶ 18). However, unlike members of the Ready Reserve, members of the Standby Reserve are not required to perform this training and do not earn pay for their service, nor are they able to accumulate the 50 points necessary for retirement purposes, given that a Standby Reservist can earn only 15 points per year. (Compl. ¶¶ 16, 51).

As plaintiffs aver, the FBI has designated all Special Agents "key federal employees" prohibited from serving in the Ready Reserve. This FBI designation issued pursuant to Department of Defense Directive ("DoD") 1200.7, which authorizes the screening of "key federal positions" from the Ready Reserve. *See* DoD Directive 1200.7 (April 6, 1984), *reprinted at* 32 C.F.R. § 44.

Under DoD Directive 1200.7, the Secretary of Defense empowered each "federal agency head," to determine which of that agency's positions constitute key positions, *i.e.* those civilian positions in the federal government which, for reasons of national security, cannot and should not be vacated during a time of national crisis. *Id.* DoD Directive 1200.7

provides that Federal agencies are precluded from filling these key positions with members of the Ready Reserve. *Id.*

In his August 29, 1996 "Memorandum to All Special Agents" ("Reserve Memorandum"), FBI Director Louis J. Freeh set forth the FBI's current policy with respect to the participation of Special Agents in the Reserves ("Reserve Policy"). *See* Oppy Decl. Ex. 9. Although the Reserve Policy was originally due to expire after one year, Director Freeh extended the policy for an additional year by issuing a separate "Memorandum to all Special Agents" on September 5, 1997 ("Extension Memorandum"). *See* Oppy Decl. Ex. 10.

As set forth in the Reserve Memorandum and the Extension Memorandum, the FBI does allow individuals to serve as both Special Agents and members of the Ready Reserve:

> Because mobilization of [Special Agents] as military Reserves would seriously erode the FBI's National Security capabilities, the determination that all [Special Agents] are "Key Federal Employees" *has not changed.*

Extension Memorandum at 1. Under the Reserve Policy, new Special Agents who are members of the Ready Reserve must request, as a condition of employment with the FBI, either a transfer to the Standby Reserve or a discharge from the Reserves. *See* Reserve Memorandum at 2.

Although thus prohibiting Special Agents from serving in the Ready Reserve, the FBI allows all employees,

including Special Agents, to serve on either the Active Duty List or the Inactive Duty List of the Spandby Reserve. *See* Extension Memorandum. Although the FBI formerly prohibited Special Agents from volunteering for ADT, the Director departed from this tradition in the Reserve Memorandum by allowing Special Agents to volunteer for ADT. *See id.*

In thus granting Special Agents permission to volunteer for ADT, the Director established a detailed procedure by which Special Agents must request ADT service. *See* Extension Memorandum. Any Special Agent wishing to volunteer for ADT must first submit a request for approval to his or her Special Agent in Charge ("SAC") or division head at least 30 days in advance of training. *Id.* An individual's request may be disapproved if, in the SAC or division head's view, granting leave "would unreasonably and adversely affect Bureau Operations." *Id.* Any Special Agent whose request for leave is denied may appeal to the Deputy Director. *Id.*

In addition to providing these procedural guidelines for Special Agents wishing to perform ADT, the Director established that Special Agents approved for ADT are entitled to take up to 15 days of military leave per year and will continue to receive FBI pay during such leave. *Id.*

Despite these recent policy changes, plaintiffs contend that the FBI's on-going practice of prohibiting Special Agents from participating in the Ready Reserve denies them their rights under USERRA, under the Leave with Pay Act, and under the Second Amendment. (Compl. ¶ 26-60).

Appendix B

II. DISCUSSION

A. Standards for a Motion to Dismiss Pursuant to Rules 12(b)(1) and a Motion to Dismiss Pursuant to Rule 12(b)(6)

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a court must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff. *See Jaghory v. New York State Dept. of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997). Under these rules, the court may not dismiss a complaint unless "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Id.* (quoting *Hoover v. Ronwin*, 466 U.S. 558, 587 (1984)).

Although the court shall construe pleadings similarly in considering motions pursuant to Rule 12(b)(1) and Rule 12(b)(6), the motions differ procedurally. On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the court may consider matters outside the pleadings, such as affidavits, documents, and deposition testimony. *See Dillard v. Runyon*, 928 F. Supp. 1316, 1321 (S.D.N.Y. 1996). To the contrary, the court is generally prohibited from considering such matters on a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Id.*

Appendix B

B. Plaintiffs' USERRA Claim

Defendants contend that plaintiffs' USERRA claim must be dismissed for failure to exhaust administrative remedies. The Court agrees.

Enacted by Congress in 1994, USERRA prohibits employment discrimination on the basis of military service. *See* 38 U.S.C. § 4301 *et seq.* (Supp. 1997). USERRA provides that: "[a] person who is a member of . . . a uniform service shall not be denied . . . retention in employment . . . on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. § 4311(a). USERRA further provides that "[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . has exercised a right provided for under this chapter." 38 U.S.C. § 4311(b).

In addition to creating these substantive rights, USERRA sets forth a detailed scheme for enforcement of rights under the Act. Under § 4323, claims under USERRA against "States" and "private employers" may be brought in federal district court. 38 U.S.C. § 4323. Under § 4324, claims against "Federal executive agencies" (not including the FBI) may be brought before the Merit Systems Protection Board. 38 U.S.C. § 4324. Finally, under § 4325, claims against "certain Federal agencies," (including the FBI) [1], may be

---

1. Section 4325 of USERRA applies to those federal agencies referred to in section 4315(a) of USERRA. Section 4315(a), in turn,

(Cont'd)

submitted to the inspector general of that agency. 38 U.S.C. § 4325. Thus, in contrast to the procedure established for employees of "States" or "private employers," who may file claims in federal district court, USERRA requires that an aggrieved FBI employee proceed along administrative channels by submitting a grievance under the Act to the inspector general of the agency.

Plaintiffs did not comply with this procedural guideline. In their complaint, plaintiffs summarily state that they have "exhausted their administrative and internal remedies." (Compl. ¶ 62). Plaintiffs' counsel further alleges that, in order "to ascertain the procedural steps necessary to challenging defendant FBI's policy," he contacted several officials at the Department of Labor and the Department of Justice, several of whom informed him that his only recourse was to institute an action in federal district court. Moschella Decl. at ¶ 5-9. Although thus contending generally that they have exhausted their administrative remedies, plaintiffs do not allege that any of them ever submitted a claim "to the inspector general of the [FBI]," as required under 38 U.S.C. § 4325.

Defendants' papers confirm that plaintiffs did not pursue the administrative remedy outlined in 38 U.S.C. § 4325. *See* Gore Decl. at 2 ("[W]hile I was Assistant Director of the

---

(Cont'd)
references those federal agencies listed in Section 2302(a)(2)(C)(ii) of Title V. Section 2302(a)(2)(C)(ii) of Title V identifies certain federal intelligence community agencies, including the FBI. Accordingly, the phrase "certain Federal agencies, as used in sections 4315 and 4325 of USERRA, includes the FBI.

Inspection Division, there were no claims submitted to the Inspection Division by FBI [Special Agents] pursuant to § 4325(b) of USERRA.")

Moreover, plaintiffs do not allege that any of them ever appealed a denial of leave to the Deputy Director, the FBI official designated to hear such appeals. *See* Reserve Memorandum. Defendants' papers confirm that none of the plaintiffs appealed a denial of leave. *See* Kennedy Decl. ("During my tenure as Deputy Director, I received no appeals as are provided for in the August 29, 1996 Memorandum"); Esposito Decl. ("Since becoming Deputy Director, I have received no appeals as are provided for in the [Reserve Memorandum]."). Thus, contrary to plaintiffs' assertions, they have not exhausted their administrative remedies under USERRA nor have they pursued the appeals process set forth in the Reserve Memorandum.

Due to this failure to exhaust available administrative remedies, plaintiffs' USERRA claims must be dismissed. "Under the exhaustion rule, a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Guitard v. U.S. Secretary of Navy*, 967 F.2d 737, 740 (2d Cir. 1992). The exhaustion requirement "may arise from explicit statutory language or from an administrative scheme providing for agency relief." *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 592 (2d Cir. 1993). If a party fails to exhaust administrative remedies, the court may then dismiss the action because subject matter jurisdiction does not exist. *See DiLaura v. Power Auth.*, 982 F.2d 73, 79 (2d Cir. 1992). Dismissal is especially warranted

when Congress has provided an extensive administrative procedure to protect the interests of individual plaintiffs. *Id.*

In *Guitard*, the Second Circuit applied the exhaustion rule to a case involving a discharged Navy Lieutenant. Finding that the Lieutenant had not exhausted his administrative remedies, the court overruled the district court's decision to intervene in the proceedings. In so holding, the Second Circuit reasoned, *inter alia*, that

> [the exhaustion rule] is based on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention.

Guitard, 967 F.2d at 740 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 756-757 (1975)). As the Second Circuit thus explained in *Guitard*, the exhaustion rule supports the long-standing principle that initial review of agency policy shall be conducted within the agency, rather than by a federal court.

In this case, plaintiffs clearly have not sought all available relief within the FBI: rather than appeal an adverse decision within the FBI, and thus subject the Reserve Policy to the sort of internal scrutiny envisioned in *Guitard*, plaintiffs have by-passed the statutory procedure provided

them under USERRA, as well as the appeals process outlined in the Reserve Memorandum, and proceeded straight to federal court. As the Second Circuit explained in *Guitard*, however, plaintiffs must demonstrate that they have exhausted the administrative remedies before seeking federal district court review.

Although this Court has been unable to locate a case wherein a court dismissed a USERRA claim for failure to exhaust administrative remedies, cases under the predecessor statute, the Vietnam Veterans Readjustment Act ("VVRA"), support dismissal of a federal court action when the administrative remedies outlined by Congress have not been exhausted. *See Marin v. New York State Dept. of Labor*, 512 F. Supp. 353, 355 (S.D.N.Y. 1981) (finding that plaintiff failed to state a claim under VVRA when exhaustion of remedies was not alleged); *Lei v. Brown*, 1995 WL 37613 (E.D. Pa. 1995) (dismissing action under VVRA for lack of subject matter jurisdiction when plaintiff had not pursued appeals process within executive agency and thus had not exhausted administrative remedies). These cases apply to plaintiffs' USERRA claim since, in enacting USERRA, Congress declared its intent that interpretation of USERRA be guided by the case law developed under the VRRA.[2]

---

2. The VRRA was amended and replaced by USERRA, codified at 38 U.S.C. §§ 4201-33, effective October 13, 1994. In enacting USERRA, Congress made clear that interpretation of the Act would be guided by the case law developed under the VRRA. "The Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in

(Cont'd)

Plaintiffs have not shown that their situation merits application of one of the established exceptions to the exhaustion rule. *See Guitard*, 967 F.2d at 740; *see also Chan v. Reno*, 916 F. Supp. 1289, 1299 (S.D.N.Y. 1996).[3] The Court finds that none of these exceptions apply.

Having found that the exhaustion rule must be applied to plaintiffs' USERRA claim, the Court grants defendants' motion to dismiss the claim for lack of subject matter jurisdiction.

C. Claims under the Leave with Pay Law

Plaintiffs also claim that they have been denied their rights under [3]38 U.S.C. § 6323, the Leave with Pay Law. The Court disagrees.

The Leave with Pay Law provides that employees are entitled to 15 days of leave, without loss in pay, per fiscal year to perform Reserve duty. 38 U.S.C. § 6323. Under the

---

(Cont'd)
interpreting these provisions." H. Rep. No. 103-65, 103d Cong., 2d Sess. 21 (1933), reprinted in U.S.C.C.A.N. 2449, 2451-52; *see also McGuire v. United Parcel Service, Inc.*, 1997 WL 543059 (N.D. Ill. 1997).

3. Exhaustion of administrative remedies may not be required when: (1) available remedies provide no "genuine opportunity for adequate relief"; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be "futile"; and (4) in certain instances a plaintiff has raised a "substantial constitutional question." *Guitard*, 967 F.2d at 740 (internal citations omitted).

Reserve Policy, a Special Agent granted leave to volunteer for ADT is "entitled to 15 calendar days of military leave while continuously receiving FBI pay." Extension Memorandum at 1. Since the FBI in fact grants Special Agents 15 days of paid leave to serve in the Reserves, the Reserve Policy clearly does not deprive plaintiffs of their rights under the Leave with Pay Law.

The Court accordingly grants defendants' motion to dismiss plaintiffs' Leave with Pay Law claim.

D. Second Amendment Claim

Finally, plaintiffs claim that the Reserve Policy denies them their rights under the Second Amendment. The Court disagrees.

The Second Amendment to the United States Constitution provides as follows:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., Amend. II. It is settled constitutional law that the Second Amendment is not a source of individual rights. Rather, the Second Amendment grants a collective right to the States to preserve "a well regulated militia." *See United States v. Miller*, 307 U.S. 174 (1939); *see also Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [United States v. Miller], the lower federal courts have uniformly held that the Second Amendment preserves a collective rather

than an individual right."), *cert. denied*, 116 S. Ct. 64, (1995); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) ("It is clear that the Second Amendment guarantees a collective rather than an individual right."), *cert. denied*, 426 U.S. 948 (1976); *Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y.) (same).

The Reserve Policy could not possible violate plaintiffs' rights under the Second Amendment since that Amendment does not confer any individual rights upon plaintiffs. Furthermore, plaintiffs have not shown that their service in the Ready Reserve would bear "some reasonable relationship to the preservation or efficiency of a well-regulated militia," which showing is required to sustain a Second Amendment claim. *See Miller*, 307 U.S. at 179; *see also Moscowitz v. Brown et al.*, 850 F. Supp. 1185, 1194 (S.D.N.Y. 1994). Therefore, plaintiffs fail to state a claim under the Second Amendment. The Court accordingly grants defendants' motion to dismiss plaintiffs' Second Amendment claim.

III. CONCLUSION

The Court grants defendants' motion to dismiss plaintiffs' USERRA claim for lack of subject matter jurisdiction. The Court also grants defendants' motion to dismiss plaintiffs' claims under the Leave with Pay Act and the Second Amendment for failure to state a claim upon which relief can be granted. The Clerk of the Court is directed to enter judgment dismissing the complaint.

Appendix B

SO ORDERED

New York, New York
March 27, 1998

s/ Lawrence M. McKenna
Lawrence M. McKenna
U.S.D.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED APRIL 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 **CIVIL** 6409 (LMM)

JOHN R. DEW, *et al.*,

Plaintiffs,

– against –

UNITED STATES OF AMERICA, *et al.*,

Defendants.

JUDGMENT

Defendants having moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and the said motion having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court thereafter, on March 27, 1998 having rendered its Memorandum and Order granting defendant's motion and dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order of March 27, 1998, defendants' motion is granted and the complaint is hereby dismissed.

Appendix C

DATED: New York New York
April 3, 1998

JAMES M. PARKISON
Clerk of Court

BY: s/ [illegible]
Deputy Clerk